Office-Supreme Court, U.S.
FILED
MAY 11 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1638

In the Supreme Court of the United States

OCTOBER TERM, 1980

FIRST EMPIRE BANK-NEW YORK, ETC., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
MARK N. MUTTERPERL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

FRANK L. SKILLERN, JR.
General Counsel

MYERS N. FISHER
Assistant General Counsel

Federal Deposit Insurance Corporation
Washington, D.C. 20429

CHARLES A. LEGGE
Bronson, Bronson & McKinnon
555 California Street
San Francisco, California 94101

QUESTION PRESENTED

Whether the court of appeals correctly held that the Federal Deposit Insurance Corporation should pay post-maturity interest on letters of credit of an insolvent national bank at the legal rate rather than at the contract or market rate.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 9

TABLE OF AUTHORITIES

Cases:

American Surety Co. v. *Bethlehem National Bank*, 314 U.S. 314 ..... 5, 6

Anderson v. *General American Life Insurance Co.*, 141 F. 2d 898, cert. denied, 323 U.S. 798 4

Armstrong v. *American Exchange National Bank*, 133 U.S. 433 4

Bates v. *Farmers Savings Bank of Ankeny*, 231 Iowa 1151, 3 N.W.2d 517 4

Cook County National Bank v. *United States*, 107 U.S. 445 6

Corbin v. *Federal Reserve Bank of New York*, 629 F. 2d 233, cert. denied, No. 80-929 (Mar. 2, 1981) 6

Douglass v. *Thurston County*, 86 F. 2d 899 4

Dunnagan v. *Best*, 59 F. 2d 795 ..... 4, 5

Elliott v. *First Inland National Bank*, 32 F. Supp. 839 ..... 4, 5, 7

PRECEDING PAGE WAS BLANK

Page

Cases—Continued:

Family Savings & Loan Ass'n v. *Stewart*, 241 Md. 89, 215 A.2d 726 7

FDIC v. *Grella*, 553 F. 2d 258 6

FDIC v. *Leggett*, 204 Ark. 780, 164 S.W.2d 882 4

FDIC v. *Mademoiselle*, 379 F. 2d 660 6

Landy v. *FDIC*, 486 F. 2d 139, cert. denied, 416 U.S. 960 7

Lorillard v. *Pons*, 434 U.S. 575 5

National Bank of the Commonwealth v. *Mechanics' National Bank*, 94 U.S. 437 4

Nebraska State Bank of Valentine, In re, 191 Neb. 427, 215 N.W.2d 869 4

Oconto County State Bank, In re, 245 Wisc. 245, 14 N.W.2d 3 ..... 4, 5

Parsons v. *Barry*, 59 F. Supp. 221, aff'd, 148 F. 2d 21, cert. denied, 326 U.S. 726 4

Republic Realty Co. v. *Phoenix Savings & Loan Ass'n*, 254 Md. 532, 255 A.2d 39 4

Stein v. *Delano*, 35 F. Supp. 260, aff'd, 121 F. 2d 975, cert. denied, 314 U.S. 655 4

Ticonic National Bank v. *Sprague*, 303 U.S. 406 4

White v. *Knox*, 111 U.S. 784 4

Page

Statutes:

12 U.S.C. 191 1
12 U.S.C. 1821(c) 1
12 U.S.C. 1821(d) 7

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1638

FIRST EMPIRE BANK-NEW YORK, ETC., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 634 F. 2d 1222. The opinion of the district court (Pet. App. B1-B3) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1980. The petition for a writ of certiorari was filed on March 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 18, 1973, United States National Bank (USNB), a national banking association, was declared insolvent by the Comptroller of the Currency. Pursuant to 12 U.S.C. 191 and 1821(c), the Federal Deposit Insurance Corporation (FDIC) was appointed receiver. The FDIC then entered into a "purchase and assumption" agreement

with Crocker National Bank, under which Crocker purchased certain USNB assets, assumed certain of its liabilities, and continued its banking business. The FDIC as insurer advanced the initial sum of $160 million needed to finance the transaction. The purpose of the purchase and assumption transaction was to minimize the impact of USNB's failure and maximize the return on its liquidated assets. The agreement permitted most of USNB's offices to open the next day as Crocker National Bank offices without further disruption (Pet. App. C4-C7).

This suit was then brought in the United States District Court for the Southern District of California by petitioners First Empire Bank and Societe Generale, which held letters of credit issued by USNB that had not been assumed by Crocker. They asserted that Crocker's assumption, carrying with it an assurance of payment of the claims that were assumed, amounted to a distribution by the FDIC in which they were entitled to share ratably (Pet. App. C2). Petitioners sought to compel the FDIC to pay both principal and interest on their letter of credit claims.

The district court held that the FDIC was not required to pay petitioners' claims from its deposit insurance fund. The court of appeals reversed the holding that the FDIC was not required to pay the claims (Pet. App. C1-C23). The court of appeals remanded the case with instructions that judgment be entered in favor of petitioners "in the amount of the face value of each USNB letter of credit held by it, plus interest from the dates of maturity, less the amount of any USNB deposit held by it" (Pet. App. C23).

Following remand, petitioners asked the district court to enter a judgment in their favor that included interest to the date of payment of each letter of credit at the contract rate specified in each letter of credit. The FDIC objected, asserting that interest should be calculated in a different way. It acknowledged that the contract rate of interest should be

paid through the maturity date of each letter of credit. However, the FDIC contended that post-maturity interest on the total principal and interest due at the time of maturity should be paid at California's legal rate of interest (7% per annum).

The district court agreed with the FDIC, holding that interest accruing after the date on which the obligations matured should be calculated at California's legal rate (Pet. App. B1-B2). The court of appeals affirmed, relying on prior federal court decisions holding that the legal rate applies following the maturity of obligations whose payment has been deferred in a bank insolvency proceeding. The court of appeals explained that petitioners, like all other creditors of USNB, received "pre-maturity interest at the contract rate" (Pet. App. A2 n.1). However, interest accruing after the date of maturity should be paid at the uniform rate established by law to achieve the goal of ratable distribution (*id.* at A3-A4):

> With different contract rates applying to different claims, the benefit-of-the-bargain rule [which would require interest payments after maturity to continue at the contract rate] would result in a decidedly unratable distribution as between disfavored creditors.
>
> Thus, in cases dealing with bank failures under the National Bank Act, it is recognized that interest upon a claim erroneously disallowed by the receiver should be calculated at the applicable legal rate.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court. The court of appeals has applied the longstanding rule that post-maturity interest on creditor claims, the payment of which has been deferred in the course of a bank insolvency proceeding, must be calculated at the legal rate of the forum state.

1. This Court has held that claimants such as petitioners are entitled to receive interest after the maturity of their claims in a bank insolvency proceeding.[1] And it has recognized that the legal rate applies in such a context. See *National Bank of the Commonwealth* v. *Mechanics' National Bank*, 94 U.S. 437, 439 (1877) (noting that, after maturity, creditor claims should "bear interest as judgments would have done"). See also *Ticonic National Bank* v. *Sprague,* 303 U.S. 406 (1938), where the Court affirmed a payment of interest that had been computed at the legal rate by the lower courts (see Brief for Petitioners, No. 374, 1937 Term, at 20).

Numerous decisions of the lower courts involving national bank receiverships have considered the question of what interest rate applies in the present context. All have employed the legal rate of interest. See *Douglass* v. *Thurston County*, 86 F. 2d 899, 910 (9th Cir. 1936); *Anderson* v. *General American Life Insurance Co.*, 141 F. 2d 898, 909 (6th Cir. 1944), cert. denied, 323 U.S. 798 (1945); *Stein* v. *Delano*, 35 F. Supp. 260, 263 (D. N.J. 1940), aff'd, 121 F. 2d 975 (3d Cir.), cert. denied, 314 U.S. 655 (1941); *Elliott* v. *First Inland National Bank*, 32 F. Supp. 839 (D. Ore. 1940); *Dunnagan* v. *Best*, 59 F. 2d 795, 796 (W.D. Tex. 1932). There are no National Bank Act cases to the contrary.[2]

---

[1]See *White* v. *Knox*, 111 U.S. 784 (1884); *Armstrong* v. *American Exchange National Bank*, 133 U.S. 433, 470 (1890); *Ticonic National Bank* v. *Sprague*, 303 U.S. 406, 410 (1938).

[2]The rule established by the above decisions for national banks has been followed uniformly in cases involving state bank insolvencies. See *In re Nebraska State Bank of Valentine*, 191 Neb. 427, 430, 215 N.W.2d 869, 872 (1974); *Republic Realty Co.* v. *Phoenix Savings & Loan Ass'n*, 254 Md. 532, 536-537, 255 A.2d 39, 41-42 (1969); *Parsons* v. *Barry*, 59 F. Supp. 221, 224-225 (D.D.C. 1944), aff'd, 148 F. 2d 21 (D.C. Cir.), cert. denied, 326 U.S. 726 (1945); *In re Oconto County State Bank*, 245 Wisc. 245, 249-250, 14 N.W.2d 3, 4-5 (1944); *FDIC* v. *Leggett*, 204 Ark. 780, 782-783, 164 S.W.2d 882, 883 (1942); *Bates* v. *Farmers Savings Bank of Ankeny*, 231 Iowa 1151, 1156, 3 N.W.2d 517, 519 (1942). As the

These authorities cannot be distinguished, as petitioners suggest (Pet. 7-8), simply because some of them are "Depression-era" cases. Congress, which has amended the federal banking laws on many occasions after these decisions were handed down, has never suggested any disagreement with the legal principle that they announce. See *American Surety Co.* v. *Bethlehem National Bank*, 314 U.S. 314, 319 n.1 (1941); see also *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

Nor is it relevant that these authorities applied a legal rate of interest that was sometimes higher than the market rate or contract rate. While some of the decisions awarded a higher interest payment by using the legal rate, others awarded a lower payment. See, *e.g.*, *Dunnagan* v. *Best, supra*, 59 F. 2d at 796. And none of the courts based its decision on whether the use of the legal rate would result in a higher or lower rate of return for the particular claimants involved.[3] See *Elliott* v. *First Inland National Bank, supra*, 32 F. Supp. at 839-840:

> Equity, unfettered, might arrive at a different result, in view of the greatly reduced interest rates for current times, but, as said, the question is controlled by statute and judicial interpretation of long standing.

Wisconsin Supreme Court explained in *In re Oconto County State Bank, supra*, 245 Wisc. at 250, 14 N.W.2d at 5: "To continue the interest at the contract rate would be manifestly unjust to the creditors, for the rates allowed under the contracts varied, as we have seen, from 2 to 4 percent, and it would, therefore, favor one class at the expense of the other. We think, therefore, that when the contracts with creditors were broken by the defendant becoming insolvent and the appointment of a receiver, so that it was unable to perform its agreements, the legal rate of interest became the rate to which all the creditors were thereafter entitled * * *."

[3]In two recent proceedings (*Bayerische Hypotheken* v. *FDIC*, Civ. No. 75-0074-N (S.D. Cal.) and *Nelsen & Sons* v. *FDIC*, Civ. No. 77-0686-N (S.D. Cal.)), the receiver's use of the legal interest rate resulted in *higher* interest payments to letter of credit claimants than would result from use of the contract rate.

Nor is petitioners' asserted entitlement to a "contract" rate of interest supported by references (Pet. 11-13) to cases arising in admiralty, equity receivership, or bankruptcy proceedings. This Court and the lower federal courts repeatedly have held that the system of receiverships for national banks is separate from bankruptcy and equity receiverships, and contains a distinct body of legal rules. See *American Surety Co.* v. *Bethlehem National Bank, supra,* 314 U.S. at 319 n.1 ("the 'bankruptcy' rule is inapplicable to the distribution of assets of insolvent national banks"); *Cook County National Bank* v. *United States*, 107 U.S. 445, 447-451 (1883); *FDIC* v. *Mademoiselle*, 379 F. 2d 660, 662-663 (9th Cir. 1967); *FDIC* v. *Grella*, 553 F. 2d 258, 261 (2d Cir. 1977); *Corbin* v. *Federal Reserve Bank of New York*, 629 F. 2d 233, 236 (2d Cir. 1980), cert. denied, No. 80-929 (Mar. 2, 1981).

2. Petitioners nonetheless argue (Pet. 8-9, 16) that use of the legal rate in a case of this kind results in a departure from the goal of ratable distribution. They note that other creditors, whose claims were subject to the FDIC's purchase and assumption agreement, received their principal debt plus the contract rate of interest until maturity. However, petitioners, like the creditors who received payment under the purchase and assumption agreement, received the contract rate of interest specified in their letters of credit prior to maturity (see Pet. App. A2 n.1). Thus, all creditors were treated alike with respect to pre-maturity interest. And, in the case of all creditors whose claims were deferred after maturity, the receiver paid the uniform legal rate of 7%. Thus, similarly situated creditors were treated in an identical fashion by the receiver.

In addition to serving the goal of ratable distribution, the legal rate has the virtue of being easy to apply in complex receivership proceedings. It avoids factual disputes about floating interest rates, the cost of replacing money, or the

loss of business opportunities, all of which would result if less definite measures of interest were used. See, *e.g.*, *Elliott* v. *First Inland National Bank, supra*, 32 F. Supp. at 839-840. Indeed, in this case, the contract rates of interest on some of petitioners' claims changed with each shift in the London Interbank Offering Rate or the prime rate. Those rates have varied from a high of approximately 13% to a low of approximately 6% (ECR 23-25, 40).[4]

3. Petitioners apparently concede (Pet. 12-14) that if this is not deemed to be a "100% dividend" case, in which all creditors receive full satisfaction of their claims, then the goal of ratable distribution is best served by using the uniform legal interest rate. They argue, however, that this is a "100% dividend" case. But, as the district court explained (Pet. App. B1-B2), this "case should not be treated as a solvent insolvency," since "the FDIC is losing more than $100 million in the process of liquidation." The FDIC is a creditor of the insolvent bank's estate that has not been paid in full and has no prospect of ever receiving 100% of the funds that it advanced. The FDIC, of course, is entitled to the same rights as other creditors of the estate. See 12 U.S.C. 1821(d); *Landy* v. *FDIC*, 486 F. 2d 139, 149 (3d Cir. 1973), cert. denied, 416 U.S. 960 (1974). Moreover, there are other creditors who have not been paid in full (ECR 66).[5]

In this connection, petitioners mistakenly argue (Pet. 16-17) that they should receive contract interest to avoid a "windfall" to the FDIC. They claim that the FDIC has had

---

[4]"ECR" refers to the Excerpts of Clerk's Record in the court of appeals.

[5]The equity authorities relied on by petitioners recognize that contract interest should not be paid when one class of creditors has not received repayment of its principal. See, *e.g.*, *Family Savings & Loan Ass'n* v. *Stewart*, 241 Md. 89, 97-98, 215 A.2d 726, 730-731 (1966).

use of their funds and has thereby had the opportunity to earn rates of return in excess of the amount it is now obligated to pay. That argument is without factual support in the record, and it has no bearing on the statutory requirement of ratable treatment of creditors. It also ignores the fact that the FDIC has lost more than $100 million in the failure of USNB.[6]

---

[6]The FDIC as insurer lent to itself as receiver the initial sum of $160 million to finance the purchase and assumption transaction. Since that time, the FDIC as insurer has made additional advances to the receivership totalling approximately $196 million for an approximate total of $356 million. See ECR 65-66. As of January 31, 1979, the receivership had returned only approximately $118 million to the FDIC from liquidation proceeds. Based upon the estimated value of the remaining pool of assets in the estate, FDIC's loss will be in excess of $118 million. See ECR 66.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
MARK N. MUTTERPERL
Attorneys

FRANK L. SKILLERN, JR.
General Counsel

MYERS N. FISHER
Assistant General Counsel
Federal Deposit Insurance Corporation

CHARLES A. LEGGE
Bronson, Bronson & McKinnon

MAY 1981

DOJ-1981-05